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Supreme Court, U.S.
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No. 96-1584

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

TERRY CAMPBELL,

Petitioner,

v.

LOUISIANA

Respondent.

On Writ of Certiorari
to the Supreme Court of Louisiana

BRIEF ON THE MERITS FOR PETITIONER

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1.a. Whether a white criminal defendant has standing to object on equal protection grounds to the race-based exclusion of grand jury forepersons even if defendant is not of the same race as the excluded grand jury forepersons?

b. Whether a white criminal defendant has standing to raise the due process claim that the former and current forepersons of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

c. Whether a white criminal defendant has standing to raise the fair cross-section claim that the former and current forepersons of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

Terry Campbell is the Petitioner. He appears herein through retained counsel, Dmitrc I. Burnes and Richard V. Burnes, 711 Washington Street, Alexandria, Louisiana 71301-8030, (318) 448-0482.

Respondent is the State of Louisiana through Attorney General Richard P. Ieyoub, 301 Main Street, Sixth Floor, One American Place, Baton Rouge, Louisiana, 70801, (504) 342-7013, and/or District Attorney Brent Coreil, 200 Court Street, Ville Platte, Louisiana 70586, (318) 363-3438.

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The published opinion of the Supreme Court of Louisiana at issue in this case is cited as *State v. Campbell*, 95-0824 (La. 10/2/95); 661 So.2d 1321. The published denial of rehearing by the Supreme Court of Louisiana is cited as *State v. Campbell*, 95-0824 (La. 11/3/95); 661 So.2d 1374. (The published opinion by the Supreme Court of Louisiana on the issues appealed in state court for which this Court did not grant certiorari is cited as *State v. Campbell,* 96-1785 (La. 1/10/97); 685 So.2d 140.)

The published opinion of the Louisiana Court of Appeal, Third Circuit, on the issues in this case is cited as *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/1/95); 651 So.2d 412. The published opinion of the Louisiana Court of Appeal, Third Circuit, on the other issues is cited as *State v. Campbell,* 94-1140 (La.App. 3 Cir. 3/13/96); 673 So.2d 1061. The unpublished denial of rehearing by the Louisiana Court of Appeal, Third Circuit, is cited as *State v. Campbell,* 94-1140 (La.App. 3 Cir. 6/7/96).

The unpublished transcript of the denial of petitioner's *Motion for New Trial* in the Thirteenth Judicial District Court, Parish of Evangeline, Criminal Docket Number 45,690-F, is included in the record beginning at page 1226. The unpublished Judgment denying petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Criminal Docket Number 45,690-F, is included in the record beginning at page 176. The unpublished transcript of the hearing on petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish

of Evangeline, 45,690-F, is included in the record beginning at page 277.

STATEMENT OF JURISDICTION

28 U.S.C. § 1257 confers jurisdiction on this Court to review on writ of certiorari judgments of the Supreme Court of Louisiana.

The Supreme Court of Louisiana rendered judgments sought to be reviewed in this case on October 2, 1995, and on January 10, 1997. The Supreme Court of Louisiana denied petitioner's timely application for rehearing with respect to the October 2, 1995, judgment in an order dated November 3, 1995. Petitioner placed his *Petition for a Writ of Certiorari* in the United States Mail on April 2, 1997. Petitioner was notified in a letter dated April 9, 1997, from the Clerk of Court for the United States Supreme Court that the petition was filed on April 4, 1997, and placed on the docket on April 8, 1997.

Petitioner was notified by the Clerk of Court for the United States Supreme Court that an order granting certiorari (limited to question 1) had been entered on September 29, 1997. Said order directed petitioner to file his *Brief on the Merits for Petitioner* by November 13, 1997. Petitioner requested an extension of time pursuant to United States Supreme Court Rule 30 4 to file his *Brief on the Merits for Petitioner* in a letter dated and mailed on November 5, 1997, to the Clerk of Court for the United States Supreme Court. Petitioner was advised in a letter dated November 7, 1997, from the Clerk of Court for the United States Supreme Court that an extension of time was granted to file his *Brief on the Merits for Petitioner* until November 19, 1997.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Louisiana Code of Criminal Procedure, Article 413, provides:

> A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.
>
> B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names to complete the

grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.

C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.

D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

Louisiana Constitution of 1974, Article 1, § 2 provides:

> No person shall be deprived of life, liberty, or property, except by due process of law.

Louisiana Constitution of 1974, Article 1, § 15

> Prosecution of a felony shall be initiated by indictment or information, but no person shall be held to answer for a capital crime or a crime punishable by life imprisonment except on indictment by a grand jury. No person shall be twice placed in jeopardy for the same offense., except on his application for a new trial, when a mistrial is declared, or when a motion in arrest of judgment is sustained.

STATEMENT OF THE CASE

The Supreme Court of Louisiana has decided important questions of federal law that have not been, but should be, settled by this Court. The decisions by the Supreme Court of Louisiana conflict with the relevant decisions of this Court in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). Additionally, the decisions by the Supreme Court of Louisiana conflict with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), and in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984). Further, the United States Court of Appeals, Fifth Circuit, has entered a decision in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983) which conflicts with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen* and *Sneed*.

I. Background

Petitioner, Terry Campbell, was arrested on January 11, 1992, and thereafter, an indictment alleging one count of second degree murder was returned against petitioner by a grand jury which was selected in an unconstitutional manner.

From the beginning, petitioner, Terry Campbell, a white man, has objected that the indictment charging him was constitutionally defective. Petitioner asserted that the grand jury foreperson selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause and also violated petitioner's due process and fair cross-section rights. It is uncontested by the state and acknowledged by the trial

court that the prior thirty-five grand jury forepersons selected over a sixteen and one-half year period had all been white. On this issue, the very narrow question presented to this Court is whether a white criminal defendant has standing to raise equal protection, due process, and fair cross-section claims when blacks are systematically excluded from selection as grand jury forepersons.

The trial court denied petitioner's *Motion to Quash Grand Jury Indictment* holding that petitioner had no standing to raise race-based constitutional claims because petitioner is white. On appeal, the Louisiana Court of Appeal, Third Circuit, rendered a judgment overturning the trial court's ruling that petitioner had no standing to raise race-based constitutional claims. Without addressing petitioner's other claims on appeal, the Louisiana Court of Appeal remanded the case with instructions to have a hearing and make a determination whether the grand jury foreperson selection process in Evangeline Parish violated petitioner's constitutional rights. However, the Supreme Court of Louisiana granted the prosecution's application for writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit, holding that a white defendant had no standing to raise race-based constitutional claims. Petitioner then filed a *Petition for Writ of Certiorari* to this Court. The State of Louisiana, in its *Respondent's Brief in Opposition to Petition for Writ of Certiorari* argued primarily that petitioner's petition was premature. This Court denied petitioner's petition for writ on May 13, 1996, in docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature.

The Louisiana Court of Appeal, Third Circuit, and

the Supreme Court of Louisiana have since ruled on petitioner's remaining issues on direct appeal and the case is now ripe for hearing by this Court.

II. Prior Rulings

A hearing was held on December 2, 1993, on petitioner's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court before the Honorable Preston M. Aucoin, District Judge. Said motion and hearing raised the issues of constitutional defects in the indictment relating to the grand jury foreperson selection process as applied in Evangeline Parish. Petitioner argued his equal protection claim, his due process claim, and his fair cross-section claim. The transcript of the hearing is included in the record beginning at page 277. In the judgment rendered on December 2, 1993, and signed on December 6, 1993, the trial court denied petitioner's motion to quash. The judgment is included in the record beginning at page 176. The trial court held that petitioner had no standing to raise race-based constitutional claims because petitioner is white. In ruling, the trial court stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no

> standing to raise that issue. That being the case the court need not consider other issues. The Motion to Quash the indictment is denied.

See the record at page 311.

Petitioner contemporaneously objected to the trial Judge's ruling. See the record at page 312.

Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against petitioner on May 12, 1994.

Prior to sentencing, petitioner timely filed a *Motion for New Trial* wherein petitioner again raised the issue of his indictment which was returned by an unconstitutionally selected grand jury. The *Motion for New Trial* is included in the record beginning at page 227. The motion was denied. The transcript of the denial of the *Motion for New Trial* is included in the record beginning at page 1226.

Petitioner, appealed his conviction to the Louisiana Court of Appeal, Third Circuit, and urged eleven assignments of error. The *Assignments of Error* filed by petitioner in his appeal is included in the record beginning at page 247. Assignment of error number one asserted that:

> [t]he trial court erred in overruling the Motion to Quash Grand Jury Indictment because Defendant was charged with a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected and that the grand jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States Constitutional Provisions.

In petitioner's brief and at oral argument, petitioner raised his equal protection, due process, and fair cross-section claims.

The State of Louisiana neither filed a brief in the appeal nor appeared for oral argument.

Without addressing the other errors raised by petitioner, the Louisiana Court of Appeal, Third Circuit, rendered a judgment dated March 1, 1995, overturning the trial court's ruling that petitioner had no standing to raise race-based constitutional claims because petitioner was white. *State v. Campbell,* 94-1140 p. 4 (La.App. 3 Cir. 3/1/95); 651 S.2d 412, 413-14. The Court of Appeal remanded the case to the Thirteenth Judicial District Court with instructions to have a hearing and make a determination whether the grand jury foreperson selection process in Evangeline Parish violated petitioner's constitutional rights. *State v. Campbell*, 94-1140 p. 4 (La.App. 3 Cir. 3/1/95); 651 So.2d 412, 413-14.

The state prepared and filed an *Application for Writ of Certiorari or Review to the Court of Appeal, Third Circuit* with the Supreme Court of Louisiana. Petitioner prepared and filed an *Opposition to Application for Writ of Certiorari or Review*. The Supreme Court of Louisiana granted the state's application for writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit. *State v. Campbell*, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324. The Supreme Court of Louisiana held in its opinion that a white defendant had no standing to raise race-based constitutional claims:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury

> foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

State v. Campbell, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324.

At this point, petitioner was faced with a dilemma. Because the Louisiana Court of Appeal, Third Circuit, and subsequently the Supreme Court of Louisiana had only ruled on one issue, it was unclear whether that one issue would then be ripe for review by the United States Supreme Court. Out of an abundance of caution, petitioner prepared and filed a *Petition for a Writ of Certiorari* with this Court raising the issue of the grand jury foreperson selection process. The State of Louisiana, through the office of the Attorney General, filed a *Respondent's Brief in Opposition to Petition for Writ of Certiorari* arguing primarily that petitioner's petition for writ was premature based on *Flynt v. Ohio,* 451 U.S. 619, 101 S.Ct. 1958, 68

L.Ed.2d 489, (1981) and *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 328, (1975). This Court denied petitioner's petition on May 13, 1996, in docket number 95-1240, without comment as to whether the denial was on the merits or because the petition was premature. *Campbell v. Louisiana*, ___ U.S. ___, 116 S.Ct. 1673 (1996).

On March 13, 1996, the Louisiana Court of Appeal, Third Circuit, ruled on petitioner's remaining issues on appeal. *State v. Campbell*, 94-1140 (La.App. 3 Cir. 3/13/96). The Louisiana Court of Appeal, Third Circuit, denied petitioner's *Application for Rehearing* on June 7, 1996. *State v. Campbell*, 94-1140 (La.App. 3 Cir. 6/7/96).

The Supreme Court of Louisiana, in a decision dated January 10, 1997, denied petitioner's *Application for Writ of Certiorari or Review. State v. Campbell*, 96-1785 (La. 1/10/97); 685 So.2d 140.

Petitioner has exhausted state remedies and the case is now ripe for consideration by this Court.

Petitioner has raised the issue of discrimination in the grand jury foreperson selection process at all stages starting with a pre-trial *Motion to Quash Grand Jury Indictment*, and by raising the issue in a timely *Motion for New Trial*, and by urging an assignment of error in his direct appeal to the Louisiana Court of Appeal, Third Circuit, and in his reply to the state's application for writ to the Supreme Court of Louisiana. Petitioner has at all times preserved this issue.

SUMMARY OF ARGUMENT

Petitioner, Terry Campbell, was indicted by a grand jury in Evangeline Parish, Louisiana, where historically, the grand jury forepersons had been selected in a discriminatory manner. Petitioner presented proof showing that for a sixteen and one-half year period up to the time of his indictment, all of the grand jury forepersons have been white. Neither the trial court, nor the prosecutor, disputed petitioner's evidence. Based upon the racial discrimination in the selection of grand jury forepersons, petitioner moved to quash the grand jury indictment raising equal protection claims, due process claims, and fair cross-section claims that rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under Article 1, §§ 2 and 15 of the Louisiana Constitution of 1974 had been violated.

It is well established law that criminal defendants have standing to challenge racial discrimination in the selection of both petit and grand jury members regardless of the race of the criminal defendant. Likewise, there is no question that a criminal defendant can challenge racial discrimination in the selection of grand jury forepersons when the criminal defendant is of the same class as those excluded from service.

This Court has also made it clear in its analysis in equal protection cases involving both grand and petit juries that the race of the criminal defendant raising the challenges is irrelevant.

In rulings at the trial court level and in the Supreme Court of Louisiana, petitioner has been denied standing to raise equal protection, due process, and fair cross-section

claims that blacks were excluded from selection as grand jury forepersons based on the fact that petitioner is white.

Although this Court has not addressed the precise question of whether a white criminal defendant can raise such claims in the context of the grand jury foreperson, the other holdings by this Court consistently uphold the right of a criminal defendant to raise such claims regardless of his race.

This Court should rule that petitioner not only has standing to raise his constitutional claims, but in view of the acknowledged proof in the case should order that the indictment be quashed and remand the case for further proceedings.

ARGUMENT

A. The Issue: 1) History of Racial Discrimination in the Selection of Grand Jury Forepersons in Evangeline Parish

For a period from January of 1976 through August of 1993, thirty-five grand jury forepersons had been selected in Evangeline Parish where approximately twenty-three percent of the registered voters were black. All thirty-five grand jury forepersons were white; none were black. Petitioner's evidence covered a sixteen and a half year period. In *Guice v. Fortenberry*, 722 F.2d 276, 280 (5th Cir. 1984), and *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991), cases involving similar claims (but involving black criminal defendants), the periods of time that the United States Court of Appeals, Fifth Circuit, found relevant were fifteen and twenty years, respectively.

2) Constitutional Claims Raised by Petitioner

Petitioner, prior to the trial on the merits in his case, filed a *Motion to Quash Grand Jury Indictment* wherein he objected that the indictment against him was constitutionally defective in that the manner of selection of grand jury forepersons was illegal and unconstitutional. More specifically, petitioner asserted that the grand jury foreperson selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clauses of both the United States Constitution and the Louisiana Constitution. Additionally, petitioner argued that the grand jury foreperson selection process violated his due process and fair cross-section rights guaranteed by the United States Constitution and the Louisiana Constitution.

B. The Law: Established Law on Issues of Discrimination in Jury Selection

It is well established law that a criminal defendant can challenge the race-based exclusion of petit jurors. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

> For over fourscore years it has been federal statutory law, 18 Stat. 336 (1875), 18 U.S.C. § 243, and the law of this Court as applied to the States through the Equal Protection Clause of the Fourteenth Amendment, that a conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race. *Strauder v. West Virginia*, 100 U.S. 303, 25 L.Ed. 664 (1880); see also *Pierre v. State of Louisiana*, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).
>
> *Whitus v. State of Georgia*, 385 U.S. 548, 549-50, 87 S.Ct. 643, 646, 17 L.Ed.2d 599 (1967).

In such a context, it has also been held that the criminal defendant making the challenge need not be of the same race (*Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972)) or gender (*Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975)).

Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), also instructs that a white defendant has standing to challenge his conviction where blacks are systematically excluded from the grand jury.

This Court held that a criminal defendant has standing to object to race based exclusion of jurors on equal protection grounds under *Batson v. Kentucky*, 476

U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), even if he is not of the same race as the challenged jurors. *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). The essence of an equal protection challenge is that defendant is asserting the rights of the excluded jurors.

And, this Court explained in *Rose v. Mitchell,* that a black criminal defendant may challenge his conviction when the discrimination extends only to the grand jury foreperson.

In a context of grand juries, it is clear that a black criminal defendant has standing to object to race based exclusion of blacks from the grand jury.

Although earlier jurisprudence was less than clear on the issue, the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), clarified that a criminal defendant does have standing to bring an equal protection claim where the issue raised is the rights of others excluded from participation in the judicial process. *Powers* held that, in the context of peremptory challenges of petit jurors, under the equal protection clause, a criminal defendant has standing to objection to race-based exclusions whether or not the defendant and those excluded share the same race.

In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), this Court held that a non-black criminal defendant has standing to challenge the system when there was a systemic exclusion of blacks from the grand jury that indicted him and the petit jury that convicted him.

The United States Supreme Court initially set out a

three step test to determine whether a defendant establishes a *prima facie* case of discrimination in an equal protection claim in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), a case involving Mexican-American criminal defendants objecting to the exclusion of Mexican-Americans from the grand jury. And in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the United States Supreme Court applied the three step process for establishing a *prima facie* case of discrimination in the context of grand jury foreperson selection:

> That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S., at 494, 97 S.Ct., at 1280. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:
>
> "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral

> supports the presumption of discrimination raised by the statistical showing." *Ibid.*
>
> Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.*, at 495, 97 S.Ct., at 1280.

Rose v. Mitchell, 443 U.S. at 565, 99 S.Ct. at 3005.

In *Rose*, the United States Supreme Court noted that discrimination in the selection of the grand jury requires reversal of a state conviction. In fact,

> where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, [this Court] uniformly has required that the conviction be set aside, and the indictment returned by the unconstitutionally constituted grand jury be quashed.

Rose v. Mitchell, 443 U.S. at 551, 99 S.Ct. at 2998 (citations omitted).

The United States Court of Appeal, Fifth Circuit, has adopted the position (in the context of black criminal defendants and discrimination in selection of the grand jury foreperson) that

> such discrimination compels voiding the indictments and convictions. "If convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination affected the foreman."

Guice v. Fortenberry, 722 F.2d 276, 282 (5th Cir. 1984). (citations omitted.)

C. The Facts: 1) Proof of Racial Discrimination in the Selection of Grand Jury Forepersons in Evangeline Parish

At the hearing held on December 2, 1993, petitioner introduced evidence establishing the proportions of blacks in Evangeline Parish for the prior sixteen and one-half year period. Petitioner's population statistics were taken from the registered voter lists of Evangeline Parish for 1976 through 1993. Petitioner's data is summarized as follows:

Date	Total	White	Black	Blacks as a % of Total
3/31/76	20,059	15,749	4,310	21.49
3/31/77	20,309	15,958	4,351	21.42
3/31/78	19,671	15,455	4,216	21.43
3/31/79	20,097	15,732	4,365	21.72
3/31/80	21,818	17,093	4,725	21.66
3/31/81	21,592	16,907	4,685	21.70
3/31/82	20,938	16,347	4,591	21.93
3/31/83	21,499	16,722	4,777	22.22
3/31/84	22,266	17,139	5,124	23.01
3/31/85	21,446	16,391	5,048	23.54
3/31/86	21,123	16,120	5,003	23.69
3/31/87	21,726	16,501	5,220	24.03
3/24/88	21,542	16,287	5,251	24.38
4/01/89	21,192	15,882	5,300	25.01
3/09/90	21,274	15,888	5,376	25.27
2/15/91	21,963	16,469	5,480	24.95
3/31/92	21,817	16,270	5,532	25.54
2/12/93	21,920	16,390	5,511	25.51

Petitioner established that during the period, no black person had ever been selected as a grand jury

foreperson. See record at pages 103-71.

It was uncontested at the December 2, 1993, hearing and in all subsequent proceedings that the prior thirty-five grand jury forepersons over a sixteen and one-half year period had all been white. **This fact was admitted not only by the state but also acknowledged by the trial judge**:

> BY THE COURT:
>
> I've asked you this question and I - there's one that you haven't satisfactorily answered. What kind of evidentiary hearing would we have. The District Attorney has already agreed that all of your figures, and your statistics, and your things that you appended to your motion are correct. So, what would you want? You would want him to bring the other judges, that we hear all these judges that are still alive and ask them how they pick juries. I tell you what they would say. They would say that they selected the foreman. That's what they would tell you.
>
> BY MR. HEARN, Counsel for Defendant:
>
> That's true. But, the D.A. would have the opportunity to show that that despite the numbers they came up by chance. It is conceivable possible.
>
> BY THE COURT:
>
> But not when you say they are all white. I mean, I don't think there is anybody in this courtroom that disputes the fact that there has never been a black grand jury foreperson in this parish. So, what kind of evidence would Mr. Vidrine put on?

See record at page 303.

The fact that zero grand jury foremen were black is compelling. "While 'statistics are not, of course, the whole answer, . . . nothing is as emphatic as zero.'" *Johnson v. Puckett*, 929 F.2d 1067, 1073 (5th Cir. 1991)(quoting *Guice v. Fortenberry*, 661 F.2d 496, 505 (5th cir. 1981)(en banc), quoting *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969)). The chances of randomly picking a white person thirty-five consecutive times given the population distribution of Evangeline Parish is less than one in ten thousand.

2) Louisiana Courts Denied Petitioner Standing to Raise Constitutional Claims

Despite the acknowledged *de facto* history of discrimination in the selection of grand jury forepersons, petitioner was denied standing to challenge the indictment by the trial court:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no standing to raise that issue. That being the case the court need not consider other issues. The Motion to

Quash the indictment is denied.
See the record at page 311.

Ultimately, the Supreme Court of Louisiana concurred in the denial of standing to petitioner to challenge the indictment:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

State v. Campbell, 95-0824 p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324.

Although petitioner has consistently raised equal protection claims, due process claims, and fair cross-section claims, the Louisiana courts have generally ignored and failed to specifically rule the fair cross-section issue. The

Louisiana courts have made their rulings using equal protection and due process language.

D. Why This Court Should Act

This case involves constitutional issues of substantial importance to criminal jurisprudence which this Court has not addressed and which the Supreme Court of Louisiana has decided in a way that conflicts with relevant decisions of this Court.

Further, the decision by the Supreme Court of Louisiana directly conflicts with the decisions entered by the United States Court of Appeals, Eleventh Circuit. And finally, there is a split in the circuits on this issue. The United States Court of Appeals, Fifth Circuit, has entered a decision which directly conflicts with the decisions entered by the Eleventh Circuit.

Due Process

A reading of the transcript of the argument at the December 2, 1993, hearing and of the trial court's ruling shows that the trial court improperly relied upon the federal case of *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), in reaching its holding that petitioner had no standing to raise his constitutional claims.

The Supreme Court of Louisiana ruled that, under *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), a white defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury forepersons because the role of the grand jury foreperson in Louisiana is ministerial. *State v. Campbell*, 95-0824, p. 4-5

(La. 10/2/95); 661 So.2d 1321, 1324.

That holding by the Supreme Court of Louisiana misapplies the holding and reasoning of *Hobby*. The United States Supreme Court distinguished the case of *Rose v. Mitchell*, stating that:

> Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members there-of.'" *Rose v. Mitchell, supra*, at 548, n. 2, 99 S.Ct., at 2996, n. 2 (quoting Tenn. Code Ann. § 40-1506 (Supp.1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed.Rule Crim.Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. **So long as the grand jury itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.**

Hobby v. United States, 468 U.S. at 347-48, 104 S.Ct. at 3098. (Emphasis added.)

In *Hobby*, the federal grand jury foreperson is selected from a properly constituted grand jury. The selection process in Evangeline Parish is similar to that used *Rose*. Pursuant to Louisiana Code of Criminal Procedure, Article 413:

> the grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors selected or drawn from the grand jury venire. In parishes other than Orleans, *the Court shall select one person from the grand jury venire to serve as foreman of the grand jury*. The Sheriff shall draw indiscriminately by lot from the envelope containing the remaining names of the grand jury venire a sufficient number of names to complete the grand jury. (Emphasis added.)

As in *Rose*, the Louisiana trial court selects one voting member of the grand jury. And the discrimination in the selection of the foreperson distorts the composition of the resulting grand jury thereby tainting the whole.

Therefore, the reliance by the Supreme Court of Louisiana on *Hobby* is inappropriate in light of the above distinction drawn by the United States Supreme Court between *Hobby* and *Rose*.

Equal Protection

The Supreme Court of Louisiana further ruled that a

defendant does not have standing to bring an equal protection claim challenging exclusion of blacks from serving as grand jury foremen when the defendant is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. *State v. Campbell*, 95-0824, p. 4 (La. 10/2/95); 661 So.2d 1321, 1324. The United States Supreme Court has not ruled on the precise question of whether a white defendant has standing to object on equal protection grounds to the exclusion of blacks as grand jury forepersons.

The decision by the Supreme Court of Louisiana that a white defendant has no standing to raise the equal protection claim that blacks were excluded from selection as grand jury forepersons is also in conflict with decisions by the United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984), *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), *United States v. Holman*, 680 F.2d 1340, (11th Cir. 1982), and *United States v. Perez-Hernandez*, 672 F.2d 1380, (11th Cir. 1982) (per curiam). The United States Court of Appeals, Eleventh Circuit, has steadfastly ruled that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to bring a claim of denial of equal protection and exclusion of other groups from serving as grand jury forepersons even though he was not of that race (or gender).

The decisions by the United States Court of Appeals, Eleventh Circuit, conflict with the decision entered by the United States Court of Appeals, Fifth Circuit, in *United States v. Cronn*, 717 F.2d 164 (1983). There, the Fifth Circuit, held that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the

judicial process as it is applied to him." *United States v. Cronn*, 717 F.2d at 169.

The first step of the *Castaneda* test is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. The confusion on the issue of standing in the state's argument and the trial court's ruling arises from its misidentification of the term "group." The state contends that "group" includes the petitioner. The ruling by the Supreme Court of Louisiana is also based in part on this same misidentification. In many of the early equal protection cases such as *Castaneda v. Partida* and *Rose v. Mitchell*, often the defendant was a member of the same minority group that was being excluded in some manner. In *Castaneda v. Partida*, the excluded group and the defendant were Mexican-American; in *Rose v. Mitchell* the excluded group and the defendant were black. The Authors of those opinions, therefore, had no reason to draw a distinction between the race of the criminal defendant and the race of the excluded class. But as *Powers* points out, the essence of this type of third party claim is that the rights of the excluded class are being raised by the criminal defendant. When analyzed properly, the "group" referred to is that of the excluded class, in this case blacks excluded as grand jury forepersons in Evangeline Parish. The United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (1984), had no problem in recognizing that the defendant need not be a member of the underrepresented or excluded group when raising an equal protection claim of discrimination in the selection process of grand jury forepersons.

The group excluded from selection as grand jury

forepersons is blacks. This is a group that is "a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. As the United States Court of Appeals, Fifth Circuit, has already noted, "[b]lacks compromise a distinct class capable of being singled out for different treatment under the laws." *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991). Indeed, in *James v. Whitley*, 39 F.3d 607, 609 (5th Cir. 1994), a case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied.

In its analysis in *Powers*, this Court noted that the discriminatory use of preemptory challenges causes the defendant cognizable injury and he has a concrete interest in challenging the practice because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be since both have a common interest in eliminating racial discrimination from the courtroom and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a jury selected in a discriminatory manner may lead to the reversal of the conviction under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his own rights. Thus, the fact that a criminal defendant's race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use

of preemptorys.

Identical logic applies to the petitioner's equal protection claim of discrimination in selection of grand jury forepersons. First, the petitioner here is caused a cognizable injury when discrimination in selection of grand jury forepersons casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. The petitioner here has the concrete interest in challenging such a practice. Secondly, the relationship between this petitioner and those excluded from selection as grand jury forepersons in Evangeline Parish is identical to the relationship between the defendant in *Powers* and the excluded petit jurors. Both Campbell and Powers would be effective proponents of the rights of the excluded members and both would have a common interest in eliminating racial discrimination in the courtroom. And finally, it is equally as unlikely in the context of the grand jury foreperson selection process in Evangeline Parish that a minority excluded from selection as a grand jury foreperson would be likely to posses sufficient incentive to set in motion a suit to vindicate his rights.

Therefore, as in *Powers*, the fact that petitioner's race differs from that of the excluded members is <u>irrelevant</u> to the analysis of his standing to object to the discriminatory practice in question.

Fair Cross-Section

Petitioner also has standing to raise his fair cross-section claims. Petitioner's race is irrelevant in deciding whether the composition of the grand jury met the Sixth Amendment's fair cross-section requirements when one member of the grand jury (the foreperson) was selected in a

discriminatory manner.

Petitioner has raised and continues to raise the issue of violation of the rights guaranteed to him under the United States Constitution and Louisiana Constitution and the fair cross-section clause of the Sixth Amendment. It is, of course, obvious that if all twelve members of the grand jury are chosen in a discriminatory manner a defendant's rights to a fair cross-section are violated. But what if only eleven are chosen in that way? What if only half or one-fourth? What if one member, the foreperson, is always chosen based on race? Discrimination is impermissible even in that case. Petitioner asserts that by selecting a grand jury foreperson in a discriminatory fashion, the entire grand jury was tainted as a result. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981)(en banc), echoed the proposition that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination effected only the foreman." *Guice v. Fortenberry*, 661 F.2d at 499.

Petitioner's races is in no way relevant to his standing to raise any of his claims. A grand jury chosen in a discriminatory manner can not be said to be unqualified to indict a black man but qualified to indict a white man.

E. The Remedy: 1) Petitioner Should Be Granted Standing to Challenge Racial Discrimination in the Selection of Grand Jury Forepersons

Petitioner has been denied the opportunity to raise constitutional challenges on equal protection grounds, due process grounds, and fair cross-section grounds to the grand jury foreperson selection process solely because he was not of the same race as those excluded from selection. This

Court has uniformly ruled in other cases which differ only slightly that a criminal defendant's race is not relevant in making such claims. In this case, the Court has the opportunity to put to rest the issue that, regardless of whether it is in the context of a petit jury, a grand jury, or only in the selection of a grand jury foreperson, the race of one who would challenge discrimination is irrelevant. To rule otherwise would be to make a sole exception in the context of selection of grand jury forepersons. Further, and more importantly, to rule that petitioner does not have standing to raise such issues would be to open the questions of exactly which kind of criminal defendants can object to which kinds of discrimination in the selection of grand jury forepersons. Could an African-American object that Mexican-Americans are being discriminated against? Could Mexican-Americans object that whites were being discriminated against? Also, the question would arise whether a given grand jury in which the foreperson was chosen in a discriminatory matter would be qualified to indict two co-defendants, one of which was white and one of which was black. Would any grand jury be qualified to indict a person of mixed race?

The legal theory behind an equal protection claim is that a criminal defendant is raising the rights of <u>others</u> excluded from the system. The race of the defendant making such a claim is not germane to the validity of such a claim. Similarly, any criminal defendant is harmed when the grand jury is composed in a discriminatory fashion. Whether the selection of the grand jury foreman is analyzed under due process or under a fair cross-section claim, it is not right to say that racial discrimination is permitted for some defendants and not for others.

2) Racial Discrimination in the Selection of Grand Jury Forepersons Requires That the Indictment Be Quashed

(This section is taken almost verbatim from the Magistrate Judge Noland's Report in the case of *Rideau v. Whitley,* Civil Action No. 94-952-B-M2, United States District Court, Middle District of Louisiana. There, Magistrate Christine Noland prepared a exhaustive study of the history of this Court's rulings on the issue of racial discrimination in the determination of who serves on the grand jury.)

More than 20 times in the last century, the United States Supreme Court has sent a message to state court systems: The 14th Amendment requires that states use racially neutral methods of selecting grand jurors. A state may not exclude African-Americans from its grand juries. To the contrary, a state may not use race or ethnic background in any way to determine who shall serve on a grand jury. A state that chooses to do so, the Supreme Court has said, risks a reversal of the conviction, even if that requires re-indicting and retrying the defendant many years after the crime.

The first Supreme Court pronouncement on this issue came only 15 years after the end of the Civil War, which had given birth to the 14th and 15th Amendments. In *Strauder v. West Virginia,* 100 U.S. 303, 25 L.Ed. 665 (1880), the court reversed and remanded a state-court conviction because African-American citizens were excluded from the grand jury that returned the indictment against the defendant. The court said that exclusion

of this kind violates the Equal Protection Clause of the 14th Amendment.

Only a year later, the court repeated this holding in *Neal v. Delaware,* 103 U.S. 370, 26 L.Ed. 567 (1881). In *Neal,* a black defendant was charged with rape. The grand jury that indicted him, and the petit jury that convicted him, were all-white. The State argued that, while its law excluded black citizens from grand jury service, the law had not been enforced in many years and thus the State was not practicing racial discrimination. The Supreme Court thought otherwise:

> The right secured to the colored man under the Fourteenth Amendment and the civil rights laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no state law can for that cause alone exclude him from the jury box, nor can a state officer be permitted in the performance of his official duties, to purposely keep the colored man off the jury lists.
>
> * * *
>
> [W]hile a colored citizen, party to a trial involving his life, liberty or property, cannot claim as a matter of right, that his race shall have a representative on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws, it *is* a right to which he is entitled, that in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no

> discrimination against them, because of their color.

Neal, 26 L.Ed. at 572-573, emphasis in original.

If the Supreme Court believed these cases would cause the states to get the message, it was mistaken. A parade of similar cases came before the court over the next 50 years. ***Bush v. Kentucky,*** 107 U.S. 110, 1 S.Ct. 625, 27 L.Ed. 354 (1883) (murder conviction reversed and remanded for exclusion of blacks from grand jury); ***Carter v. Texas,*** 117 U.S. 442, 20 S.Ct. 687, 44 L.Ed. 839 (1900) (murder conviction reversed and remanded when defendant not given opportunity to challenge exclusion of blacks from grand jury); ***Rogers v. Alabama,*** 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904) (same); ***Hollins v. Oklahoma,*** 295 U.S. 394, 55 S.Ct. 784, 79 L.Ed. 1500 (1935) (per curiam); ***Norris v. Alabama,*** 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1904); ***Hale v. Kentucky,*** 303 U.S. 613, 58 S.Ct. 753, 82 L.Ed. 1050 (1938) (per curiam, citing affidavit evidence of systematic lack of blacks on grand juries).

In ***Pierre v. Louisiana,*** 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939), the Supreme Court for the first time analyzed a Louisiana parish's practices of drawing a grand jury venire. The defendant was black and was charged with murder. He presented sworn evidence that the population of the parish where he was charged was at least one-third black. Despite this, his grand jury venire contained the names of no black citizens. The state presented nothing to rebut this evidence. The Supreme Court found that the defendant's evidence

was sufficient to demonstrate racial discrimination in the selection of both the grand jury and the petit jury.

Only three years later, the Supreme Court for the first time had to determine how to evaluate testimony from local officials that they did not discriminate on the basis of race. In ***Hill v. Texas,*** 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559 (1942), the defendant claimed that blacks in the county where he was indicted were systematically excluded from grand jury service. The defendant presented evidence that of the 66,000 county residents who paid the poll tax and thus were qualified to sit as grand jurors, about 8,000 were black. Despite this, there were no blacks on the grand jury list.

The State introduced evidence from county officials who testified that they had no prejudice against naming blacks to the grand jury, but they did not know of any qualified blacks. The county's assistant district attorney testified that he had no memory of any blacks being named to the county's grand juries.

The Supreme Court reversed and remanded. In doing so, the Court again reminded the states of their responsibility under the 14th Amendment, despite any feelings their citizens may have toward an accused person:

> Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is

> that its safeguards extend to all - the least deserving as well as the most virtuous.

Hill, 316 U.S. at 406, 62 S.Ct. at 1162.

In *Patton v. Mississippi,* 332 U.S. 463, 68 S.Ct. 184, 92 L.Ed. 839 (1950), the court considered a ruling from the state court that the lack of a black person on the state's grand juries for more than 30 years was irrelevant in determining whether racial discrimination was practiced. The Supreme Court responded to this position first by disagreeing and then by determining that the state court's use of such reasoning detracted from the weight and respect the Supreme Court would otherwise give the state court's conclusions. Again, the Supreme Court reversed the state court and remanded the case.

That same year, the court ruled that it is insufficient for jury commissioners to shrug their shoulders and proclaim they know of no qualified blacks. The court held that the jury commissioners have a duty to acquaint themselves with qualified black citizens. *Cassell v. Texas,* 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed. 839 (1950). Thus, the court said, jury commissioners may not simply choose people they know. See also *Eubanks v. Louisiana,* 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 (1958), in which the court was faced with testimony from public officials that, although blacks were under-represented on grand juries, it was not because they intentionally discriminated. The officials testified they were just trying to pick the best grand jurors. The court rejected this evidence and remanded the case.

Discrimination may be proved in other ways

> than by evidence of long continued unexplained absence of Negroes from many panels. The statements of the jury commissioners that they chose only whom they knew, and that they knew no eligible Negroes in an area where Negroes make up so large a proportion of the population prove the intentional exclusion that is discrimination in violation of petitioners constitutional rights.

Cassell, 339 U.S. at 290, 70 S.Ct. at 633.

. . . Cassell argued that a pattern emerged in which only one black was assigned to each grand jury, apparently as part of a plan to do so. The Supreme Court agreed and issued a warning to the states that such "token" assignments would not do.

> The contention is that the Akins case has been interpreted in Dallas County to allow a limitation of the number of Negroes on each grand jury, provided the limitation is approximately proportional to the number of Negroes eligible for grand-jury service ... If ... commissioners should limit proportionally the number of Negroes selected for grand jury service, such limitations would violate our Constitution.

Cassell, 339 U.S. at 286, 70 S.Ct. At 631.

Five years later, the Supreme Court discussed the consequences of maintaining a jury selection system in which the selection panel knows the race of the potential jurors. *Avery v. Georgia,* 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244 (1955). The court concluded that a system in which petit

jury venires were selected from cards that featured the race of the potential jurors, when coupled with evidence that blacks were excluded from service, violated the 14th Amendment. Such a system, the court said, "makes it easier for those to discriminate who are of a mind to discriminate." [345 U.S. at 562, 73 S.Ct. at 892.]

Identical results occurred in *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967) and *Jones v. Georgia,* 389 U.S. 24, 88 S.Ct. 4, 19 L.Ed.2d 25 (1967), where county officials selected grand jurors based on public records that identified the candidates by race. This, coupled with evidence that only a minute number of blacks were selected for grand jury service led the court to conclude that the defendant had proven a prima facie case of racial discrimination. Thus, it became the State's burden to provide evidence to rebut this case. Because the State failed to do so, the convictions were reversed, and the cases were remanded. See also *Sims v. Georgia,* 389 U.S. 404, 88 S.Ct. 523, 19 L.Ed.2d 634 (1967), a per curiam opinion in which the court used a similar analysis and found a case of racial discrimination, despite testimony from a jury commissioner who claimed that he had not intended to racially discriminate.

Other cases found evidence of racial and ethnic discrimination when the defendant submitted evidence of historical exclusion or under-representation in comparison with eligible persons in accordance with U.S. Census figures. *Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 1244 (1954); Reece *v. Georgia,* 350 U.S. 85, 76 S.Ct.

167, 100 L.Ed. 77 (1955); *Arnold v. North Carolina,* 376 U.S. 773, 84 S.Ct. 1032, 12 L.Ed.2d 77 (1964).

In *Turner v. Fouche,* 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970), the court held that a grand jury was empaneled in a racially discriminatory manner where (1) there was evidence of under-representation of blacks on grand juries and (2) the jury commissioners made selections based on subjective factors such as whether the candidates were "upright" or "intelligent."

A similar result occurred in *Alexander v. Louisiana,* 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). In *Alexander,* a black man was charged with rape. The defendant presented evidence that in Lafayette Parish, 21 percent of the population consisted of blacks who were eligible for grand jury service. Despite this, the selection system, which included mailing questionnaires to eligible persons, resulted in 20 grand juries that had only 6.75 percent black members. On the defendant's 20-member grand jury venire, only one person was black. The Supreme Court reversed the defendant's conviction and remanded the case, even though the court found no evidence the jury commissioners consciously selected grand jurors by race. In doing so, the court said:

> [W]e do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral. The racial designation on both the

> questionnaire and the information card provided a clear and easy opportunity for racial discrimination.

Alexander, 405 U.S. at 630, 92 S.Ct. at 1225.

In Peters v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 32 L.Ed.2d 83 (1972), the Supreme Court was faced for the first time with addressing racial discrimination in grand jury selection in (1) a habeas case, (2) where the criminal defendant was white and (3) where the state argued the conviction should not be reversed because the defendant could not show he was harmed. In reversing the case on due process grounds, the court said:

> It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce. For there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case.
>
> * * *
>
> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters, 407 U.S. at 503-504, 92 S.Ct. at 2169.

In *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), the court summarized the development of standards in the case law. To prevail on a claim of racial discrimination in the selection of a grand jury, the test is: (1) the excluded group is recognizable and distinct and that has been singled out for different treatment under the laws as they are written or applied and (2) the group has been substantially under-represented over a significant period of time.

In subsequent cases, the Supreme Court has not wavered from this approach. In *Rose v. Mitchell,* 443 U.S. 546, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the court specifically rejected the argument that a defendant should have to demonstrate prejudice to obtain reversal based on an unconstitutionally selected grand jury. The court also found that habeas relief is proper when the defendant presents evidence to support such a finding. In *Vasquez v. Hillery,* 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986), the court rejected the State's claim that reversal of a conviction because of illegal discrimination in the selection of a grand jury is too high a price to pay because of the difficulty of having to re-try the defendant many years later.

> Yet intentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the state to prevent. Thus, the remedy we have embraced for over a century - the only effective remedy for this violation - is not disproportionate to the evil it seeks to deter.

> If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.
>
> *Vasquez,* 474 U.S. at 262, 106 S.Ct. at 617, footnote omitted.

(Petitioner greatfully acknowledges the research and effort of Magistrate Christine Noland in producing the preceding material.)

CONCLUSION

This Court should address the conflicts in the decisions by the Supreme Court of Louisiana, the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Eleventh Circuit, concerning whether a white defendant has standing to object to the race-based exclusion of grand jury forepersons on equal protection, due process, and fair cross-section grounds even if not of the same race as those excluded as grand jury forepersons. This Court should rule that petitioner, Terry Campbell, has standing to raise equal protection, due process, and fair cross-section claims that the grand jury foreperson selection process in Evangeline Parish discriminated against blacks, even though petitioner is a white male. Further, this Court should Quash the indictment handed down by an unconstitutionally constituted grand jury and remand the case for further proceedings.

Respectfully Submitted,
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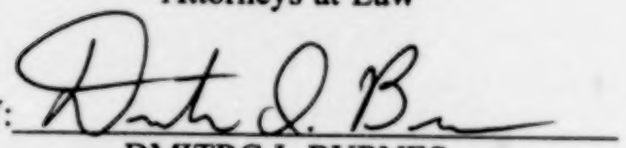
Attorneys at Law

BY: 

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